

No. 72-1371

Supreme Court, U. S.
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In the Supreme Court of the United States
OCTOBER TERM, 1973

**DONALD C. ALEXANDER, COMMISSIONER OF
INTERNAL REVENUE, PETITIONER**

v.

"AMERICANS UNITED" INC., ETC., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	7
Argument:	
I. The lower courts had no jurisdiction to allow injunctive and declaratory relief respecting petitioner's revocation of the tax ruling	13
A. This suit is barred by the Anti-Injunction Act	13
1. Historical background and the statutory scheme for judicial review of tax decisions	13
2. The decision below contravenes the express terms of the Anti-Injunction Act	17
3. The tripartite exception to the Anti-Injunction Act created by the court of appeals below is without foundation and would disrupt revenue administration	20
B. The suit is barred by the tax exception to the Declaratory Judgment Act	37

II

Argument—Continued	Page
C. This action constitutes an uncontested suit against the United States and is barred by sovereign immunity	42
II. Respondents have not presented a substantial Constitutional question justifying the convening of a three-judge court	49
Conclusion	57
Appendix	59

CITATIONS

Cases:

<i>Allen v. Regents</i> , 304 U.S. 439	17, 30
<i>Allen v. Shelton</i> , 96 F. 2d 102	29
<i>Automobile Club v. Commissioner</i> , 353 U.S. 180	47
<i>Bailey v. George</i> , 259 U.S. 16	21
<i>Bailey v. Patterson</i> , 369 U.S. 31	49
<i>Bingler v. Johnson</i> , 394 U.S. 741	48
<i>Bob Jones University v. Connally</i> , 73-1 U.S.T.C., par. 9185, rehearing denied, 73-1 U.S.T.C., par. 9306, petition for writ of certiorari pending, No. 72-1470	19, 20, 22, 26, 30
<i>Bob Jones University v. Connally</i> , 341 F. Supp. 277	21
<i>Bullock v. Latham</i> , 306 F. 2d 45	41
<i>California v. Latimer</i> , 305 U.S. 255	21
<i>Cammarano v. United States</i> , 358 U.S. 498	13, 55, 56

III

Cases—Continued	Page
<i>Carmichael v. Southern Coal Co.</i> , 301 U.S. 495	54
<i>Cary v. Curtis</i> , 3 How. 236	44
<i>Center on Corporate Responsibility, Inc. v. Shultz</i> , 73-2 U.S.T.C., par. 9517 (D. D.C.), remanded for further proceedings, 73-2 U.S.T.C., par. 9518 (C.A. D.C.)	32
<i>Cheatham v. United States</i> , 92 U.S. 85	14, 15
<i>Christian Echoes Nat. Ministry, Inc. v. United States</i> , 28 A.F.T.R. 2d 5934, appeal dismissed on jurisdictional grounds, 404 U.S. 561, district court reversed, 31 A.F.T.R. 2d 460, petition for writ of certiorari pending, No. 72-1378	36
<i>Collins v. Daly</i> , 437 F. 2d 736	22
<i>Corbus v. Gold Mining Co.</i> , 187 U.S. 455	29
<i>Cottman Co. v. Dailey</i> , 94 F. 2d 85	49
<i>Crenshaw County Private School Foundation v. Connally</i> , 73-1 U.S.T.C., par. 9287, petition for writ of certiorari pending, No. 73-170	19, 20, 22, 30
<i>Cutting v. Gilbert</i> , 6 Fed. Cas. No. 3,519	14
<i>Davenport, Ex parte</i> , 6 Pet. 661	44
<i>Dodge v. Osborn</i> , 240 U.S. 118	21, 30
<i>Dugan v. Rank</i> , 372 U.S. 609	47
<i>Elliott v. Swartwout</i> , 10 Pet. 137	44
<i>Enochs v. Williams Packing Co.</i> , 370 U.S. 1	8, 9, 10, 11, 12, 15, 17, 20, 30, 31, 34, 36, 37, 51

IV

Cases—Continued	Page
<i>Filipowicz v. Rosenthies</i> , 31 F. Supp. 716	
<i>Flint v. Stone Tracy Co.</i> , 220 U.S. 107	29
<i>Gardner v. Helvering</i> , 88 F. 2d 746, certiorari denied, 301 U.S. 684	24
<i>Georgia v. Atkins</i> , 10 Fed. Cas. No. 5,350	14
<i>Gillette v. United States</i> , 401 U.S. 437	56
<i>Green v. Kennedy</i> , 309 F. Supp. 1127, on final injunction <i>sub nom. Green v. Connally</i> , 330 F. Supp. 1150, affirmed per curiam <i>sub nom. Coit v. Green</i> , 404 U.S. 997	31
<i>Harvey v. Early</i> , 160 F. 2d 836	22
<i>Hawaii v. Gordon</i> , 373 U.S. 57	47
<i>Helvering v. Davis</i> , 301 U.S. 619	29
<i>Hill v. Wallace</i> , 259 U.S. 44	17, 19, 30
<i>Idlewild Liquor Corp. v. Epstein</i> , 370 U.S. 713	49
<i>J. C. Penney Co. v. United States Treasury Dept.</i> , 439 F. 2d 63, affirming 319 F. Supp. 1023, certiorari denied, 404 U.S. 869	25, 49
<i>Jolles Foundation v. Moysey</i> , 250 F. 2d 166	22, 36, 40
<i>Jules Hairstylists of Maryland v. United States</i> , 268 F. Supp. 511, affirmed per curiam, 389 F. 2d 389, certiorari denied, 391 U.S. 934	21, 41
<i>Kuper v. Commissioner</i> , 332 F. 2d 562	50, 51
<i>Larson v. Domestic & Foreign Corp.</i> , 337 U.S. 682	46, 47
<i>League of Women Voters of U. S. v. United States</i> , 180 F. Supp. 379	51

Cases—Continued

Page

<i>Liberty Amendment Committee of the U.S.A. v. United States</i> , No. 72-721-HP, affirmed <i>per curiam</i> , No. 26,507 (C.A. 9), certiorari denied, 409 U.S. 1076	40
<i>Liberty Nat. Bank & Trust Co. v. United States</i> , 122 F. Supp. 759	51
<i>Louisiana v. McAdoo</i> , 234 U.S. 627	11, 34, 47, 48
<i>Lowe Bros. Co. v. United States</i> , 304 U.S. 302	45
<i>Marker v. Connally</i> , 29 A.F.T.R. 2d 798, affirmed on non-jurisdictional grounds, No. 72-1499 (C.A. D.C.), decided August 8, 1973	32-33
<i>McCoy v. Shultz</i> , 73-1 U.S.T.C., par. 9233	33
<i>McGlotten v. Connally</i> , 338 F. Supp. 448	31, 40, 41
<i>Miller v. Nut Margarine Co.</i> , 284 U.S. 498	17, 30
<i>Mitchell v. Riddell</i> , 402 F. 2d 842, appeal dismissed and certiorari denied, 394 U.S. 456	42
<i>Moore v. Miller</i> , 5 App. D.C. 413, appeal dismissed, 163 U.S. 696	34
<i>Nichols v. United States</i> , 7 Wall. 122	44
<i>North Carolina v. Temple</i> , 134 U.S. 22	46
<i>Pietsch v. President of the United States</i> , 434 F. 2d 861	22
<i>Pollock v. Farmers' Loan & Trust Co.</i> , 157 U.S. 429	29
<i>Poresky, Ex parte</i> , 290 U.S. 30	49

VI

Cases—Continued

Page

<i>San Antonio Independent School District v. Rodriguez</i> , No. 71-1332, decided March 21, 1973	12, 52, 53, 54
<i>Savings Institution v. Blair</i> , 116 U.S. 200	45
<i>Seasongood v. Commissioner</i> , 227 F. 2d 907	50, 51
<i>Singleton v. Mathis</i> , 284 F. 2d 616	42
<i>Smietanka v. Indiana Steel Co.</i> , 257 U.S. 1	45
<i>Snyder v. Marks</i> , 109 U.S. 189	16
<i>State Railroad Tax Cases</i> , 92 U.S. 575	13, 15
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548	54
<i>Sunshine Coal Co. v. Adkins</i> , 310 U.S. 381	29
<i>Tomlinson v. Smith</i> , 128 F. 2d 808	40, 41
<i>United States v. Correll</i> , 389 U.S. 299	48
<i>United States v. Garbutt Oil Co.</i> , 302 U.S. 528	45
<i>United States v. O'Connor</i> , 291 F. 2d 520	15, 44
<i>United States v. Phelps</i> , 8 Pet. 700	44
<i>United States v. Swift & Co.</i> , 286 U.S. 106	25
<i>Walz v. Tax Commission</i> , 397 U.S. 664	56
<i>West Chester Feed & Supply Co. v. Erwin</i> , 438 F. 2d 929	24, 42
<i>Wingreen Co., In re</i> , 412 F. 2d 1048	27, 42
<i>Wolkstein v. Port of New York Authority</i> , 178 F. Supp. 209	48

VII

Constitution and statutes:

Constitution of the United States:

First Amendment	5, 13, 22, 55, 56
Fifth Amendment	22, 51, 53, 54
Fourteenth Amendment	46
Act of September 2, 1789, c. 12, 1 Stat. 65	43
Act of May 8, 1792, c. 37, 1 Stat. 279, Sec. 6	43
Act of March 3, 1839, c. 82, 5 Stat. 339, Sec. 2	44
Act of February 26, 1845, c. 22, 5 Stat. 727	44
Act of March 2, 1867, c. 169, 14 Stat. 471, Sec. 10	13
Act of July 30, 1954, c. 648, 68 Stat. 589	45

Internal Revenue Code of 1939 (26 U.S.C. 152 ed.):

Sec. 23(a)	55
Sec. 23(o)	3
Sec. 101(6)	3

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 103	27
Sec. 170	3, 4, 5, 46, 54
Sec. 170(c) (2)	2, 3, 18, 20, 31, 32, 40, 50, 59
Sec. 362(b)	27
Sec. 368(a)	27
Secs. 401-404	27
Sec. 501	46

VIII

Constitution and statutes—Continued	Page
Sec. 501(c) (3)	2, 3, 4, 5, 6, 18, 19, 20, 31, 32, 34, 35, 40, 50, 54, 60
Sec. 501(c) (4)	2, 3, 4, 18, 19, 40, 61
Sec. 509	55
Sec. 1032	27
Sec. 3101(a)	19
Sec. 3121(b)	19
Sec. 3121(k)	19
Sec. 3301	3, 61
Sec. 3306(c)	3, 18, 61-62
Sec. 4945	55
Sec. 6212	15, 45, 55
Sec. 6213	15, 45
Sec. 6532	15
Sec. 6532(a)	34
Sec. 6861	15
Sec. 7421(a)	2, 13, 62
Sec. 7422	15
Sec. 7426	16, 41, 45
Sec. 7801	47
Sec. 7805(a)	47
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 274	45
Revenue Act of 1935, c. 829, 49 Stat. 1014, Sec. 405	38
5 U.S.C. § 701	16
28 U.S.C.:	
§ 1346	15
§ 1491	15
§§ 2201-2202	2, 37, 63

IX

Constitution and statutes—Continued	Page
§ 2202	37-38
§ 2410	16
31 U.S.C. § 1002	43

Miscellaneous:

Bittker and Kaufman, <i>Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code</i> , 82 Yale L. J. 51 (1972)	39
Borchard, <i>Declaratory Judgments</i> (1941 ed.)	33, 38, 39
Caplin, <i>Limitations on Exempt Organizations: Political and Commercial Activities</i> , N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations 265	51
Caplin, <i>Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles</i> , 20 N.Y.U. Institute on Federal Taxation 1 (1962)	26, 27
Clark, <i>The Limitation on Political Activities: A Discordant Note in the Law of Charities</i> , 46 Va. L. Rev. 439	
78 Cong. Rec., Part 6, p. 5959	55
H. Conf. Rep. No. 2276, 83d Cong., 2d Sess. (2 U.S.C. Cong. & Adm. News (1954) 2716)	45
H. Rep. No. 659, 83d Cong., 1st Sess.	45
Lehrfield, <i>How Much Politicking Can a Charitable Organization Engage In?</i> , 29 J. Taxation 236 (1968)	51
Letter ruling to Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664	51

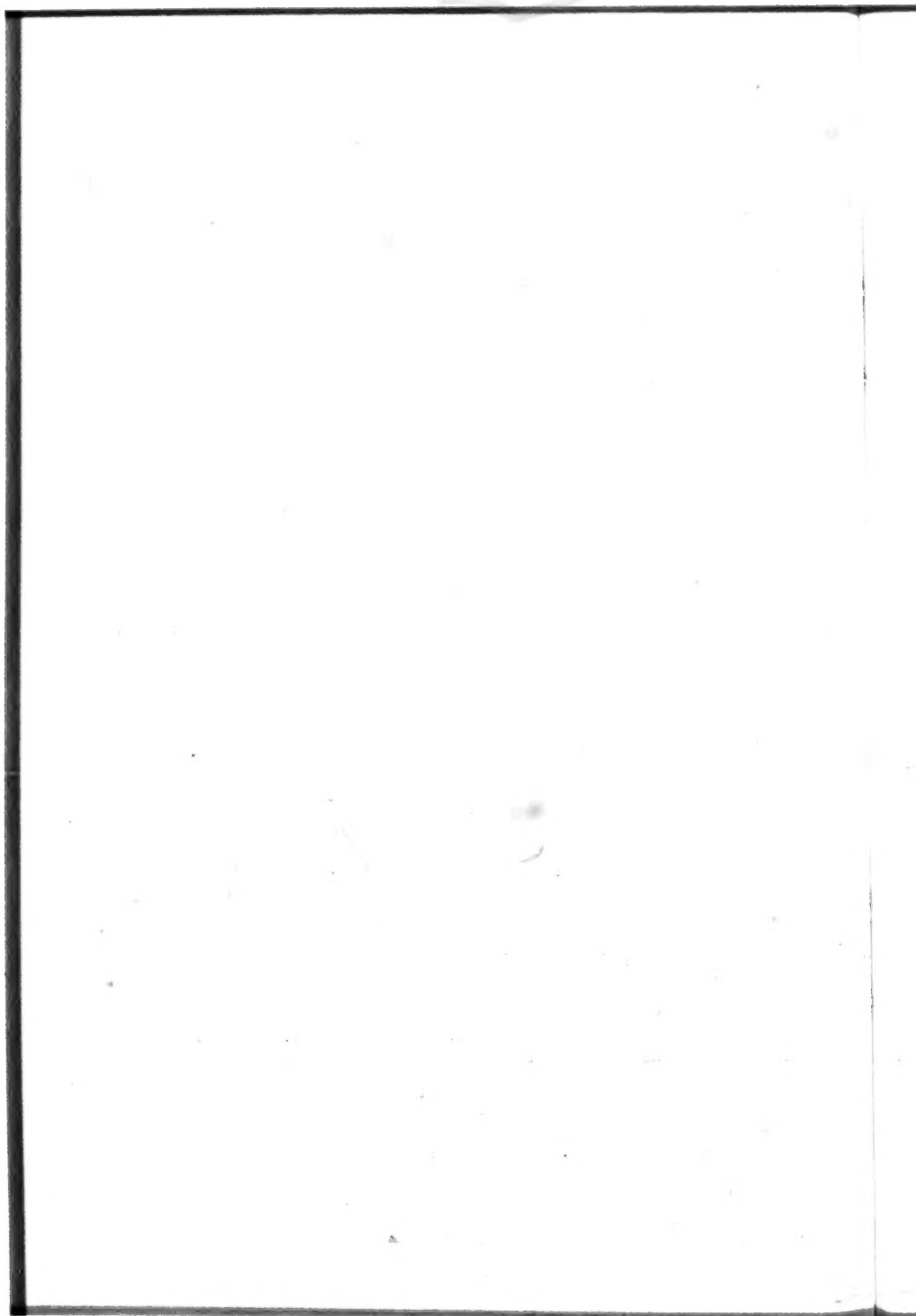
X

Miscellaneous—Continued	Page
Littleton, <i>Practical Effects of New Procedures for Obtaining Rulings—An Insider's Viewpoint</i> , 1970 Tulane Tax Institute 289	26
Note, <i>Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition</i> , 49 Harv. L. Rev. 109 (1935)	14
Note, <i>Income Taxes—Deductions: In General—Etc.</i> , 80 Harv. L. Rev. 1793 (1967)	50, 53
Note, <i>Political Activity and Tax Exempt Organizations Before and after the Tax Reform Act of 1969</i> , 38 Geo. Wash. L. Rev. 1114 (1970)	55
Note, <i>Summary Disposition of Supreme Court Appeals: The Significance of a Limited Discretion and a Theory of Limited Precedent</i> , 52 Boston U. L. Rev. 373	31
Note, <i>Tax Treatment of Lobbying Expenses and Contributions</i> , 67 Harv. L. Rev. 1408 (1954)	50, 53
Plumb, <i>Tax Refund Suits Against Collectors of Internal Revenue</i> , 60 Harv. L. Rev. 684 (1947)	45
Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, superseded, Rev. Proc. 72-39, 1972-2 Cum. Bull. 818	19
S. Rep. No. 1005, 73d Cong., 2d Sess.	38
S. Rep. No. 1240, 74th Cong., 1st Sess. (1939-1 Cum. Bull. (Part 2) 651)	39
Smith, <i>Tax Rulings—Their Use and Abuse</i> , 1970 So. Calif. Tax Institute 663	26

Miscellaneous—Continued

Page

Statement of Assistant Commissioner Norman A. Sugarman in Hearings before the House Special Committee to Investigate Tax Exempt Foundations and Comparable Organizations, June 2, 1954, 83d Cong., 2d Sess., pp. 423, 433-434	51
Statement of the Commissioner of Internal Revenue, Hearings on Treasury Department and Related Agencies Appropriations for 1968, Subcommittee of the House Committee on Appropriations, 90th Cong., 1st Sess., p. 536 (Feb. 17, 1967)	51
Treasury Regulations 111:	
§ 29.23(o)-1	55
§ 29.23(q)-1	55
Treasury Regulations 118, § 39.101(6)-1 (c)	22
<i>The Work and Jurisdiction of the Bureau of Internal Revenue</i> , GPO (1948) 8, 16, 43, 47	



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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 21)¹ is not officially reported. The opinion of the court of appeals (R. 22-45) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (R. 46) was entered on January 11, 1973. The petition for a writ

¹ "R." references are to the separately bound record appendix.

of certiorari was granted on June 4, 1973. (R. 48.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The corporate respondent (respondent) had an advance ruling recognizing its exemption from income taxes pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954 and assuring its contributors of deductibility of their contributions under Section 170(c)(2). In 1969, the Commissioner withdrew the exemption ruling on the ground that the respondent had engaged in lobbying activities prohibited by Sections 170(c)(2) and 501(c)(3), and then issued a ruling under Section 501(c)(4) recognizing respondent's exemption from tax but not assuring deductibility of contributions. The question presented is:

Whether the respondent is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, or otherwise, from obtaining injunctive or declaratory relief requiring the Commissioner to issue a ruling that respondent is exempt under Section 501(c)(3), and therefore that contributions to it are deductible under Code Section 170(c)(2).

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code and the Declaratory Judgment Act are set forth in the Appendix, *infra*, pp. 59-63.

STATEMENT

The respondent is organized under the laws of the District of Columbia as a nonprofit, educational corporation. (R. 11-12.) On July 3, 1950, the Commissioner issued a ruling recognizing that respondent qualified for tax exemption under Section 101(6) of the Internal Revenue Code of 1939, the predecessor to Section 501(c)(3) of the 1954 Code. (R. 7.) As a result of this ruling, contributors to the respondent were assured that their contributions would be deductible under Section 23(o)(2) of the 1939 Code, and later under Section 170(c)(2) of the 1954 Code. On April 25, 1969, the Commissioner, by letter ruling, revoked the 1950 ruling on the ground that the respondent had violated Sections 170(c)(2)(D) and 501(c)(3) and the applicable Regulations by devoting a substantial part of its activities to attempts to influence legislation. (R. 7-10.)

The respondent is still exempt from income taxes as a "social welfare" organization under Section 501(c)(4) of the Code, in spite of the withdrawal of the tax exemption ruling under Section 501(c)(3). (R. 24.) Organizations which are exempt from tax under Section 501(c)(4), however, are not eligible for tax-deductible contributions under Section 170. In addition, organizations exempt from tax under Section 501(c)(3) are exempt from the payment of unemployment (F.U.T.A.) taxes under Section 3301 and 3306(c)(8) of the Internal Revenue Code of 1954, while organizations which are tax-exempt under

Section 501(c)(4) are liable for these taxes. The Internal Revenue Service advises that the corporate respondent began paying F.U.T.A. taxes in February, 1970, and has continued making payments regularly since that time.²

On July 30, 1970 (R. 2), the respondent and two of its benefactors filed suit seeking injunctive and declaratory relief which would declare the Commissioner's administration of the lobbying proscriptions in Sections 170 and 501(c)(3) to be erroneous or unconstitutional, and which would require reinstatement of the respondent's former 501(c)(3) ruling. The respondent brought the suit on behalf of itself, its members, and (R. 13) "all other similarly situated nonprofit corporations which have lost or are being threatened by a loss of their status as 501(c)(3) organizations * * *." The individual respondents sued in their own behalf and in behalf of "all other Federal income taxpayers similarly situated." (R. 12-13.)

In the Amended Complaint, it was first alleged (R. 13, 25) that the Commissioner's administration of the statutory lobbying proscriptions violated the due process rights of the respondent and other similarly situated organizations. The thrust of this allegation, which was given primary emphasis on appeal

² The Service advises that respondent paid F.U.T.A. taxes for 1969 in the amount of \$981.13; for 1970 in the amount of \$1,052.60; for 1971 in the amount of \$889.09; and for 1972 in the amount of \$1,131.36.

(R. 40),³ was that the Commissioner unconstitutionally allows large tax-exempt organizations to engage in a greater absolute number of political activities than it allows to smaller organizations, since the amount of political activities allowed before the prohibited "substantial" level is reached is measured in proportion to the organizations' total activities. It was also alleged that this application of the "substantial" political activities test violates the rights of the individual respondents under the religion clauses of the First Amendment, since large churches are thereby allowed to engage in a greater number of political activities than are small organizations such as the corporate respondent. In addition, it was alleged that the respondent is an "active advocate of a political doctrine"—namely, an advocate of the religious [sic] clauses of the First Amendment," and that the Commissioner's application of the substantial political activities prohibition in Section 501(c)(3) to the respondent and similarly situated organizations violates the rights of the members of these organizations to freedom of speech, freedom of the press, and freedom to petition for redress of grievances. (R. 12-15.)

³ Respondents did not advance in the court of appeals their additional allegations (R. 15-16) that the statutory words "substantial" and "propaganda" in Sections 170 and 501(c)(3) constitute an "invalid unconstitutional delegation of legislative power" in that they are "lacking in specificity * * *" and "devoid of meaning and inadequate as a standard for administrative action." The court of appeals thus had no opportunity to rule on these contentions.

The Amended Complaint concluded by asserting that the corporate respondent had no adequate remedy at law since no taxes had been assessed as a result of the revocation of the ruling under Section 501(c) (3) and, therefore, the respondents were not seeking, and could not seek, a refund of taxes. It also stated that irreparable injury would be suffered if relief were not granted since "[a]s a result of * * * [petitioner's] action the * * * [respondent] has operated at a loss for the year 1970, for the first time since 1949." (R. 15.)

As relief, respondents requested (1) that the court issue a declaratory judgment that "the exemption clauses of Section 501(c) (3) are separable from the remainder of the section and are null and void"; (2) that the Commissioner be enjoined "from enforcing Sections 170(c) and 501(c) (3) * * * so as to deprive the individual * * * [respondents] and others similarly situated of the benefit of tax advantages in the exercise of their First Amendment rights"; and (3) that the Commissioner be required to reevaluate the withdrawal of the respondent's ruling "in the light of the final decision in this case." (R. 16.) In order to secure this relief, respondent requested the convening of a three-judge court. (R. 16.)

The district court held that the suit was barred by the Anti-Injunction and Declaratory Judgment Acts and dismissed it for lack of jurisdiction. (R. 21.) The court of appeals held that the action could not be brought by the individual respondents, since they sought relief which would enjoin the Commissioner

from assessing taxes on those dollars contributed by them to the corporate respondent, which relief was barred by the Anti-Injunction Act. (R. 30-32.) With respect to the corporate respondent, however, the court held that the suit was not barred by the Anti-Injunction and Declaratory Judgment Acts. It stated that those jurisdictional prohibitions were inapplicable because (1) it was alleged that the substantial political activities test was unconstitutional; (2) the "primary design" of the suit is to prevent diversion of contributed funds away from the organization, the suit thus does not "directly or 'indirectly'" concern taxes levied upon the organization, and "[t]he restraint upon assessment and collection is at best a collateral effect;" and (3) the respondent would sustain irreparable injury for which there was no adequate remedy at law in the form of a refund suit. (R. 32-38.) The court of appeals also held that the suit was not barred by sovereign immunity. (R. 38-39.) Finally the court of appeals held that a three-judge court should be convened, reasoning that respondent's due process contention raised a substantial constitutional question. (R. 39-43.)

SUMMARY OF ARGUMENT

I

1. Since the founding of the Republic, all three branches of government have recognized that the prompt and efficient collection of the federal revenues is a paramount national concern. The First Congress invested the Treasury Secretary with broad authority

to make the myriad of administrative decisions, including the promulgation of advance "rulings," necessary for the expeditious assessment and collection of the revenues.⁴ For several decades, Congress was reluctant to allow federal taxpayers any waiver of the government's immunity from suit respecting these administrative decisions; it was not until the middle of the nineteenth century that Congress permitted taxpayer suits to review the Executive's administrative decisions in refusing to allow claims for refund.

Concomitantly, however, Congress in the Anti-Injunction Act expressly prohibited the courts' exercise of their injunctive powers in tax assessment or collection matters. Later, in the 1930's, when the then recently authorized declaratory judgment suits threatened to paralyze the administration of the processing taxes, Congress enacted an even broader prohibition against declaratory suits in matters respecting "Federal taxes." While this Court has never had occasion to rule on the scope of the latter prohibition, it has consistently refused to allow injunctive suits to restrain a tax assessment or collection absent a showing of irreparable injury to the complainant without legal remedy, and, in addition, a showing of an abuse of the executive power so blatant as to render it certain that revenue officials cannot prevail on the merits of their claims. *Enochs v. Williams Packing Co.*, 370 U.S. 1.

⁴ See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948).

It is against this deeply rooted policy of barring the equity powers of the federal courts from impinging on the administrative determination process necessary for revenue collection that the instant injunctive suit must be viewed. Respondent's advance letter ruling assuring that its contributors could deduct their donations was withdrawn in 1969 because of the substantiality of respondent's lobbying activities. Respondent now seeks broad injunctive relief requiring reinstatement of the ruling and allowance of the deductions on the ground that the "substantial" lobbying test is unconstitutional. Respondent alleges that other available remedies—a suit for refund of F.U.T.A. taxes, a Tax Court petition, or a refund test suit by a friendly contributor—are inadequate and seeks an immediate injunction. The court of appeals held, and respondent apparently does not dispute, that the two-part *Williams Packing* standard for allowing injunctive relief has not been satisfied. Instead, the appellate court fashioned *sua sponte* a new tripartite exception to the Anti-Injunction Act and then held that respondent had satisfied it. The court's opinion respecting each of the three segments of its novel test runs counter to decisions of this Court; as a whole, the test would impose the equity powers of the federal courts heavily on the tax rulings system and seriously disrupt revenue administration.

First, the court of appeals held that the injunctive complaint stated a valid claim since it alleged that the Commissioner's standard for decision is in violation of the Constitution. This holding contravenes

numerous decisions of this Court that the constitutional character of the complainants' claims is irrelevant for purposes of determining application of the Anti-Injunction Act. The same factor has been rejected by three courts of appeals, including the Fourth and Fifth Circuits, where private segregated schools alleged that the Commissioner's withdrawal of deductibility assurance rulings from racially discriminatory schools was unconstitutional. If a claimed violation of constitutional rights were allowed as a basis for an exception to the Anti-Injunction Act, many suits would doubtless be framed in constitutional terms. Preliminary injunctions could well prevent the Commissioner from executing tax determinations and other assessment activities until lengthy trial and appellate proceedings could determine the merits of the claims.

The second segment of the court of appeals' test brings into play its holding that the respondent's "primary design" was to prevent the adverse "collateral" effect of decreased contributions, rather than a design directly or indirectly to restrain tax assessments. The vagueness of this distinction between "collateral" and "direct or indirect" effects, based on the complainant's subjective intent, would impose an intolerable burden on the Internal Revenue Service and would enormously increase the range of complainants eligible to seek injunctions against the collection of the revenue.

The third segment of the court of appeals' test purports to mirror the second part of the *Williams*

Packing exception— the showing of irreparable injury for which there is no adequate legal remedy. The test is, of course, relevant, but it was incorrectly applied here. The court gave no reason why a suit by respondent for refund of unemployment taxes would be an inadequate remedy—indeed, *Williams Packing* itself involved taxes relating to employment. In any event, the legal issues presented here respecting respondent's eligibility for a deductibility assurance ruling could quickly be determined in a refund suit brought by a friendly donor, such as an officer or employee of respondent.

Even apart from the Anti-Injunction Act prohibitions, the tax exception to the Declaratory Judgment Act also bars the instant suit. The latter statute prohibits declaratory judgment suits "with respect to Federal taxes," together with injunctions in aid thereof. The legislative history of this tax exception indicates that Congress intended that tax determinations, assessments, and collections should be litigable only in the usual refund and Tax Court actions. The author of the Declaratory Judgment Act and other commentators have indicated that its prohibition on suits respecting taxes is broader than the Anti-Injunction Act .

2. The present suit is also barred by sovereign immunity. Since at least 1792, Treasury Department officials have apparently issued and withdrawn rulings such as that here free from judicial interference. This Court has specifically held that suits to alter these rulings cannot be brought absent the Government's consent. *Louisiana v. McAdoo*, 234 U.S. 627.

There is no warrant for the exception from the sovereign immunity bar relied on by the court of appeals, *i.e.*, that it was alleged that the Commissioner was acting in an unconstitutional manner. The exception does not apply where, as here, the injunction suit seeks broad affirmative relief against the Executive officials, such as requiring them to issue deductibility assurance rulings to respondent and all similarly situated organizations.

II

Even if this Court should decide that the district court had jurisdiction, it will not be necessary to decide finally the substantive Constitutional questions involved. In the lower courts, the parties focused on these issues to determine if the second *Williams Packing* test was met; respondent has apparently abandoned that position, and, accordingly, it is only necessary to determine here if the Constitutional questions are "substantial" for purposes of convening a three-judge court.

Respondent's contention that the statutory proscription against substantial lobbying activities unconstitutionally discriminates in favor of wealthy organizations is without merit. Lobbying expenditures are not measured simply in terms of activities, but also in terms of relative time, frequency, and number of programs and activities devoted to lobbying. Accordingly, the statutory test carries little if any advantage to wealthy organizations *per se*. In any event, this Court in the *San Antonio Independent School District* case specifically rejected the

type of relative-wealth-discrimination argument which respondent makes here. As for respondent's First Amendment contentions, the court of appeals properly held that they were disposed of by this Court's decision in *Cammarano v. United States*, 358 U.S. 498.

ARGUMENT

I

THE LOWER COURTS HAD NO JURISDICTION TO ALLOW INJUNCTIVE AND DECLARATORY RELIEF RESPECTING PETITIONER'S REVOCATION OF THE TAX RULING

A. This suit is barred by the Anti-Injunction Act

1. *Historical background and the statutory scheme for judicial review of tax decisions*

The federal Anti-Injunction Act provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867⁵ in order to prevent the wave of injunctive suits which had swept over the state taxation systems from inundating the federal tax system. See *State Railroad Tax Cases*, 92 U.S. 575, 613.⁶ In the latter case, the Court em-

⁵ The statute originated as Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

⁶ Prior to the enactment of the Anti-Injunction Act, at least two federal courts had indicated their willingness to

phasized the important purpose of the Anti-Injunction Act, stating (*ibid.*) that it

shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. [Emphasis in original.]

And in *Cheatham v. United States*, 92 U.S. 85, 89, the Court outlined the grave dangers which would accompany intrusion of the injunctive power of the courts into the administration of the revenue:

If there existed in the courts * * * any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. * * * [A] free course of remonstrance and appeal is allowed within the departments before the money is finally exacted * * *. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid * * *.

In general, then the strict prohibition on injunctive suits is founded on the Executive's need to assess and collect taxes as quickly and as efficiently as possible,

issue injunctions against the assessment or collection of federal taxes. *Georgia v. Atkins*, 10 Fed. Cas. No. 5,350 (N.D. Ga.); *Cutting v. Gilbert*, 6 Fed. Cas. No. 3,519 (S.D. N.Y.). There is no legislative history respecting the purpose of Congress in enacting the Anti-Injunctive Act. See Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935).

with a minimum of delay and interference from the judicial branch. See *State Railroad Tax Cases*, *supra*, 92 U.S. at 575; *Cheatham v. United States*, *supra*; *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7. The assessment and collection of the federal revenues requires the Treasury Department to make literally millions of administrative decisions, including the acceptance of tax returns for filing, audits of returns, issuance of revenue rulings, and promulgation of regulations. These and numerous other administrative decisions are potentially the subject of litigation between taxpayers and the government. Congress, however, has wisely limited the types of tax administrative actions which may be reviewed by the courts. First, a taxpayer may obtain review of a notice of deficiency by filing a timely petition in the Tax Court. Section 6212 and 6213 of the Internal Revenue Code of 1954.⁷ Secondly, a taxpayer may obtain review of the denial of a claim for refund (or the failure to act thereon for a six-month period) by means of a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.⁸ With the exception of a few

⁷ The existence of the Tax Court review procedure does not conflict with the government's fundamental right to assess and collect taxes prior to litigation. Under the jeopardy assessment procedures of Code Section 6861, the Commissioner may assess and collect taxes at any time before or during Tax Court proceedings if he "believes that the assessment or collection * * * will be jeopardized by delay * * *."

⁸ A taxpayer may also raise his non-liability for a tax as a defense in a collection suit. *United States v. O'Connor*, 291 F. 2d 520 (C.A. 2).

other miscellaneous types of suits authorized by specific statutes which are not relevant here,⁹ the administration of the Internal Revenue Code is otherwise committed by Congress to the discretion of the Secretary of the Treasury and the Commissioner of Internal Revenue and is not subject to judicial review. See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948); cf. Section 10 of the Administrative Procedure Act, 5 U.S.C. 701. As this Court said in the early case of *Snyder v. Marks*, 109 U.S. 189, 193-194:

* * * the system prescribed by the United States in regard to * * * internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, an enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by * * * [the Anti-Injunction Act], that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed * * *.

In only one type of situation has this Court allowed a severely limited exception to the statutory prohibi-

⁹ See, e.g., Section 7426 of the Internal Revenue Code (suits by non-taxpayers whose property has been levied upon to satisfy the tax liability of another); 28 U.S.C. 2410 (suit by property owner to quiet title to property and formally remove a tax lien which has been satisfied by payment of the taxes).

tion on injunctions against tax assessment or collection activities. In *Enochs v. Williams Packing Co.*, *supra*,¹⁰ the Court held that a taxpayer might obtain an injunction against assessment or collection of taxes only if he satisfied a twofold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; in addition he must show that "equity jurisdiction otherwise exists" because of the existence of irreparable injury for which there is no adequate legal remedy. In the instant case, the court of appeals refused to apply the *Williams Packing* test (see Pet. App. 40) and devised a new test of its own. Respondent, moreover, both here (Resp. to Pet. 5) and in the court below, apparently has recognized that it cannot satisfy the twofold *Williams Packing* test, and it argues instead that there exist other exceptions to the Anti-Injunction Act which are applicable in this case.

2. *The decision below contravenes the express terms of the Anti-Injunction Act*

Before considering in detail the alternative exception to the Anti-Injunction Act set forth by the court of appeals, we examine briefly the facts of this case in relation to the statutory language. In 1950, respondent received an advance letter ruling from the

¹⁰ In *Enochs*, the Court clarified the "exceptional circumstances" test enunciated in *Miller v. Nut Margarine Co.*, 284 U.S. 498 and other cases. See *Allen v. Regents*, 304 U.S. 439, 449, and *Hill v. Wallace*, 259 U.S. 44, discussed at page 30, *infra*.

Internal Revenue Service advising that it was exempt from income taxes under the predecessor of Code Section 501(c)(3), Appendix, *infra*, p. 60, and that contributions to respondent would be deductible by the donors under the predecessor of Section 170(c)(2), Appendix, *infra*, pp. 59-60. Since all organizations exempt from tax under Section 501(c)(3) are also exempt from federal unemployment taxes under Code Section 3306(c)(8), Appendix, *infra*, pp. 61-62, the letter ruling necessarily assured respondent that it would not have to pay the unemployment taxes.

In 1969, this letter ruling was revoked, on the ground that respondent had violated Section 170(c)(2)(D), Appendix, *infra*, p. 59, and 501(c)(3) by devoting a substantial part of its activities to attempts to influence legislation. (R. 7-10.) At about the same time, the Internal Revenue Service issued respondent another letter ruling advising that it was still exempt from taxation under Section 501(c)(4) as an organization "operated exclusively for the promotion of social welfare * * *." This action was possible since Section 501(c)(4), Appendix, *infra*, p. 61, does not contain a prohibition against lobbying, as do Sections 170(c)(2) and 501(c)(3). As a direct and immediate result of this substitution of the Section 501(c)(4) ruling for the Section 501(c)(3) ruling, contributors to taxpayer became liable for income tax deficiency assessments for any deductions taken with respect to subsequent contributions to respondent.¹¹ In addition, respondent itself became li-

¹¹ Although revocation of respondent's tax exemption ruling was retroactive in effect (R. 10), withdrawal of its eligibility

able for the payment of federal unemployment taxes. For example, in 1970, the year in which this suit was filed, the respondent paid a total of \$981.13 in federal unemployment taxes as a result of the revocation of its Section 501(c)(3) exemption ruling.¹²

It is clear, therefore, if the requested injunction is allowed here, tax assessments with respect to both respondent and its contributors will have been enjoined, in direct contravention of the prohibition of the Anti-Injunction Act. In *Bob Jones University v. Connally*, 73-1 U.S.T.C., par. 9185, rehearing denied, 73-1 U.S.T.C., par. 9306 (C.A. 4), petition for writ of certiorari pending, No. 72-1470, and *Crenshaw County Private School Foundation v. Connally*, 73-1 U.S.T.C., par. 9287 (C.A. 5), petition for writ of

for tax deductible contributions was solely prospective. Rev. Proc. 68-17, 1968-1 Cum. Bull. 806, superseded, Rev. Proc. 72-39, 1972-2 Cum. Bull. 818.

¹² Many exempt organizations in similar circumstances would additionally have become liable for the first time for federal social security (F.I.C.A.) taxes, since only organizations exempt under Section 501(c)(3)—not Section 501(c)(4)—are also exempt from F.I.C.A. taxes. Code Sections 3101(a) and 3121(b)(8)(B). However, respondent alleged in the court of appeals (Supp. Memo. 3-4) that it had elected pursuant to Section 3121(k) to pay F.I.C.A. taxes even prior to the revocation of its Section 501(c)(3) ruling. Because of this election, the respondent is barred for a period of two years from revoking the election and filing suit for refund of the F.I.C.A. taxes. Respondent apparently does not wish to pursue this course of action, since it would then be barred by Code Section 3121(k)(3) from renewing the election to pay the F.I.C.A. taxes and in this manner provide retirement benefits for its employees. See Respondent's Supplemental Memorandum in the court of appeals, p. 4.

certiorari pending, No. 73-170, the courts refused injunctive relief in similar circumstances. There the Treasury Department had withdrawn, or threatened to withdraw, the complainant schools' tax exemptions under Section 501(c)(3) and their deductibility assurance ruling under Section 170(c)(2), on the ground that the schools had racially discriminatory admissions policies. The courts properly rejected the schools' contentions that the Anti-Injunction Act was inapplicable, reasoning that the requested injunction would preclude taxation of the funds contributed by donors and the income of the schools, and would thus restrain tax assessment.¹³ These decisions properly recognize the long-standing policy reasons for excluding the courts' injunctive power from the judicial system in the tax area.

3. *The tripartite exception to the Anti-Injunction Act created by the court of appeals below is without foundation and would disrupt revenue administration*

The court of appeals here departed from the *Williams Packing* standard applied in *Bob Jones* and *Crenshaw*, and held that the Anti-Injunction Act was inapplicable on the basis of a novel tripartite exception. We submit that the approach devised *sua*

¹³ The Fourth Circuit on rehearing distinguished the instant case on the mistaken assumption that loss of the tax exemption ruling under Section 501(c)(3) would not result in greater tax liabilities for the respondent. The Fourth Circuit apparently overlooked the respondent's F.U.T.A. tax liability. In any event, the effect of an injunction in preventing assessment of taxes against donors is sufficient to require application of the Anti-Injunction Act.

sponte by the court of appeals here has no support in the statutory language or the decided cases, and would lead to grave interference with revenue administration.

(i) The first test set forth by the court of appeals involves the nature of the substantive claim asserted by the complainant. The court emphasized that respondent does not attack the "applicability of a test or * * * [its] ability to qualify under presently existing standards," but rather contends that "the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional * * *." (R. 35.) In addition, the court quoted with approval the opinion of the district court in *Bob Jones University v. Connally*, 341 F. Supp. 277 (D.S.C.) (since reversed on appeal), which allowed an injunction in similar circumstances where the constitutionality of the Treasury's policy was challenged.

The fact that the instant case involves a claim that the Treasury officials' policy is unconstitutional, however, is irrelevant for purposes of the prohibitions set forth in the Anti-Injunction Act and the Declaratory Judgment Act. It has long been held that one or both of these statutes bar suits to restrain assessment or collection, regardless of the constitutional character of the claims presented. *E.g.*, *Bailey v. George*, 259 U.S. 16; *California v. Latimer*, 305 U.S. 255; *Dodge v. Osborn*, 240 U.S. 118, 121; *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511, 514, 515 (D.Md.), affirmed *per curiam*,

389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934; *Harvey v. Early*, 160 F. 2d 836, 837 (C.A. 4) (citing cases); *Pietsch v. President of the United States*, 434 F. 2d 861, 862 (C.A. 2) (Clark, Ret. J.); *Collins v. Daly*, 437 F. 2d 736, 739 (C.A. 7). Indeed, three of the other four courts of appeals decisions which have involved attempts by tax exempt organizations to enjoin the revocation of their eligibility for tax deductible contributions have also involved claims of constitutional violations.¹⁴

If a claimed violation of constitutional rights were allowed as a basis for an exception to the Anti-In-

¹⁴ *Bob Jones University v. Connally*, *supra*, and *Crenshaw County Private School Foundation v. Connally*, *supra*, involved claims that the Treasury's policy of denying tax exempt status to racially discriminatory private schools violated taxpayers' rights under the First Amendment. The attempt (R. 35) of the court of appeals in the instant case to distinguish the case of *Jolles Foundation v. Moysey*, 250 F. 2d 166 (C.A. 2), on the ground that it "did not involve the alleged unconstitutionality of a taxing statute," is unfounded. In *Jolles*, the Internal Revenue Service had revoked the deductibility assurance and tax exemption ruling of an organization because of its political activities on behalf of the late Senator Joseph McCarthy. (Brief for the Appellant in the Second Circuit in *Jolles*, p. 6.) The organization brought suit, alleging that the definition of education in Section 39.101 (6)-1(c) of Treasury Regulations 118 (1939 Code) was contrary to the statute and unconstitutionally vague in violation of the due process clause of the Fifth Amendment. (*Id.*, pp. 25-27.) In holding that this suit was prohibited by the tax exception to the Declaratory Judgment Act, the Second Circuit's opinion noted the "lengthy recital of assumed violations of constitutional rights" and the "elaborate" constitutional arguments (250 F. 2d at 169), but nonetheless held that the suit was barred by the tax exception to the Declaratory Judgment Act.

junction Act, many ordinary tax suits would doubtless be framed in constitutional terms in order to circumvent these prohibitions. Only after lengthy trial and appellate proceedings could it be determined whether the claim was in fact constitutional, and, if so, whether it was valid. In the meantime, preliminary injunctions might well prevent the Treasury from assessing and collecting the appropriate taxes and the purpose of the Anti-Injunction Act would be defeated.

(ii) The second element of the court of appeals' test is even less conventional and also disregards both the applicable precedents and the letter and spirit of the congressional restrictions on the equity jurisdiction of the courts in federal tax cases. The court held that the suit was justified because the "primary design" of the respondent was to prevent diversion of contributed funds away from itself, rather than to lower the taxes of its contributors (or, presumably, to avoid the assessment of F.U.T.A. taxes on itself) and consequently, that the restraint on collection of taxes was "collateral" rather than direct (R. 35). We note that the district court had made no factual findings and there was no evidence in the record to establish respondent's "primary design" in bringing the suit. But, in any event, there is no authority in the decisions of this Court or other courts to the effect that the application of the Anti-Injunction Act prohibition should turn on the complainant's subjective intent, and the opinion of the lower court cites none.

Indeed, it is not difficult to understand why the courts have not created an exception to the plain language of the Anti-Injunction Act which would require their attempting to determine the "primary design" of the taxpayer seeking an injunction or whether the effect of the injunction sought would be "collateral" or "direct" with respect to the assessment and collection of taxes.¹⁵ Administration of such

¹⁵ The court of appeals attempted (R. 37) to distinguish its earlier decision in *Gardner v. Helvering*, 88 F. 2d 746 (C.A. D.C.), certiorari denied, 301 U.S. 684, on the ground that there complainant's taxes were "indirectly" rather than "collaterally" involved. In *Gardner*, the complainant desired to purchase refuse palm oil, the processors of which were subject to a processing tax under a Treasury ruling. Since the complainant was not a processor, and the processor would not handle the oil if it was taxable, the complainant brought suit for an order that the processing tax was invalid and unconstitutional. The court held that the suit was barred by the Anti-Injunction Act, even though the relief would not alter the complainant's tax liabilities and there was no other way for the complainant to challenge the imposition of the tax. The restraint on tax assessment in that case was just as collateral as in the instant case, but the court nevertheless held that the suit was barred by the Anti-Injunction Act.

The court of appeals also attempted (R. 37) to distinguish *West Chester Feed & Supply Co. v. Erwin*, 438 F. 2d 929 (C.A. 6). There a non-taxpayer corporation sought an injunction requiring the Commissioner to lower his valuation of the estate of a taxpayer shareholder. The valuation would not affect the non-taxpayer's future federal tax liabilities, as the court of appeals here stated (R. 37); rather, it would affect only the non-taxpayer's future *state* tax liabilities. Nonetheless, the Sixth Circuit held that the federal Anti-Injunction Act was applicable because of the restraint on assessment of the estate taxes. If the possible effect of the suit on the non-taxpayer complainant's *future* tax liabilities

a vague standard would impose an undesirable burden not only on the courts but also to an even greater extent on the Internal Revenue Service, whose unimpeded ability to collect taxes is the primary purpose of the Anti-Injunction Act.

The adverse effect of reading this vague test into the prohibition on injunctions set forth in that Act would be heightened by the vagaries of the injunction process itself. A final injunction is often virtually perpetual in effect; a change in the applicable law or facts would often require reapplication to the court and further litigation in order to modify the injunction. Cf. *United States v. Swift & Co.*, 286 U.S. 106. The continuing supervision necessary to assure modification of the injunctive order, when appropriate, and to keep posted on the latest applicable injunctive orders would be especially burdensome in situations such as that present here, where revenue officials are continually auditing and processing returns of contributors to the organization claiming exempt status. In addition, where assurance of deductibility of contributions is in issue, organizations would be prompted to seek injunctive relief in the hope of obtaining a preliminary injunction and reaping the benefits of the interim assurance of deductibility of contribu-

had to be measured, of course, suits such as that here would impose an even greater burden on the courts and the Service. Cf. *J.C. Penny Co. v. United States Treasury Dept.*, 439 F.2d 63, 68-69 (C.A. 2), affirming 319 F. Supp. 1023 (S.D. N.Y.), certiorari denied, 404 U.S. 869.

tions, even if they should eventually lose on the merits.¹⁶

The vague exception to the injunction prohibition adopted by the court of appeals would have even more disruptive effects if applied outside the exempt organizations area. In many types of situations a certain selectivity in issuing rulings is necessary in order to utilize best the limited resources of the Internal Revenue Service. See Littleton, *Practical Effects of New Procedures for Obtaining Rulings—An Insider's Viewpoint*, 1970 Tulane Tax Institute 289; Smith, *Tax Rulings—Their Use and Abuse*, 1970 So. Calif. Tax Institute 663; Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. Institute on Federal Taxation 1, 7-10 (1962). In numerous instances, the Treasury is asked to rule by persons whose taxes

¹⁶ In *Bob Jones University v. Connally*, *supra*, numerous donations were solicited and apparently obtained by the complainant on the strength of a preliminary injunction which was reversed on appeal. Indeed, the complainant there, through requests for stays and further proceedings in the district court, has continued its efforts to retain the benefits of the preliminary injunction even after the court of appeals decisions. Proceedings of this nature are far more burdensome to the government than a Tax Court or refund suit. Litigation of the *Bob Jones* injunction suit has necessitated virtually continual co-ordination among the Justice Department and the National and Regional Offices of the Internal Revenue Service in order to ensure compliance with the preliminary injunction and to avoid any action which would place officials in contempt of court.

are not directly in controversy.¹⁷ These cases would presumably come within the exception to the injunction prohibition established by the court of appeals. The United States is presently the only nation in the world which issues advance rulings on the tax effects of prospective transactions. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, supra*, at 1. Congress has decreed that persons whose own tax burdens are adversely affected may obtain judicial review through

¹⁷ Examples of these situations include requests by governmental units respecting the tax exempt character of interest on their bonds under Code Section 103; requests by corporations respecting the manner in which they should compute their earnings and profits for purposes of characterizing distributions to stockholders; and requests by governmental units and other tax exempt organizations respecting the qualification of their pension trusts under Code Sections 401-404. Another example is a request by an acquiring corporation for a ruling that a stock-for-stock exchange qualifies as a Section 368(a)(1)(B) reorganization. (The acquiring corporation will ordinarily recognize no gain whether or not the transaction is classified as a reorganization under Section 368(a)(1)(B). See Section 1032. Indeed, the corporation's own taxes may be reduced by failure to qualify the transaction as a "B" reorganization, since in that event it would obtain a stepped-up basis for the acquired stock. See Section 362(b). Acquiring corporations frequently request "B" reorganization rulings in order to ensure that the shareholders of the acquired corporation will not recognize gain on the transaction and that they will thus agree to the exchange. See Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, supra*, at 23-24.) See also, *In re Wingreen Co.*, 412 F. 2d 1048, 1050 (C.A. 5). In all of these situations, the issuance or non-issuance of the ruling will often have no beneficial effect on the tax liabilities of the requesting party.

statutory proceedings. If the content or nonissuance of advance rulings should become the subject of injunctive suits by diversely affected citizens, the discretion necessary to administer an efficient rulings program would be seriously impaired.

Nor would the deleterious effect of the court of appeals' decision on tax administration be confined to the area of tax rulings. Nothing in the opinion of the court of appeals requires that the primary purpose or collateral effect test should be limited to the ruling segment of the assessment and collection activities of the Internal Revenue Service. The Service's assessment and collection activities have adverse "collateral" effects on numerous groups and individuals whose taxes are not in issue in the proceedings. For example, imposition of a greater tax on a corporation may mean smaller dividends to the shareholders; imposition of a tax on a supplier may require an increase in the supplier's prices and place its customers at a competitive disadvantage; increases in taxes of manufacturers increase prices to consumers. It would be virtually impossible to estimate the number of administrative actions by the Internal Revenue Service which cause collateral detriment to other groups of individuals. If only a small proportion of these administrative actions could be subjected to judicial review on the complainant's showing that he was *collaterally* injured but was not *primarily* concerned with his own tax liabilities, the

disruption of the assessment and collection process would be overwhelming.¹⁸

¹⁸ The court of appeals appears to have recognized (R. 37) a long series of decisions of this Court holding that a shareholder cannot enjoin his corporation from paying a tax (under a procedure which is now obsolete, see *Allen v. Shelton*, 96 F. 2d 102, 103 (C.A. 5)) unless the Treasury has waived the Anti-Injunction Act. *E.g.*, *Helvering v. Davis*, 301 U.S. 619, 639-640; *Sunshine Coal Co. v. Adkins*, 310 U.S. 381; *Hill v. Wallace*, 259 U.S. 44, 62-63; *Flint v. Stone Tracy Co.*, 220 U.S. 107; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554. The court dismissed these cases, however, on the ground that "In those situations * * * a non-taxpayer sue[d] in the stead of the taxpayer * * *." It is true that in one of the cases cited by the court of appeals, *Corbus v. Gold Mining Co.*, 187 U.S. 455, the suit was dismissed because the shareholder was suing in the stead of the corporation and there was no real controversy between the shareholder and the corporation. But that case merely emphasized this Court's requirement that the controversy between the shareholder and the corporation must be genuine before any type of suit is allowed, and that there must exist a real controversy between the complainant shareholder and the corporation; yet the shareholder in that case was allowed to join Treasury officials as defendants only because the Executive waived the benefit of the Anti-Injunction Act.

The rationale for the government's occasional waiver of the benefit of the Anti-Injunction Act was summarized at page 31 of the government's brief in this Court in *Helvering v. Davis* (No. 910, Oct. Term, 1936), *supra*:

We agree that Sec. R.S. 3224 [the predecessor of Code Section 7421] is intended to prevent equitable interference with the collection of Federal taxes by all devices, including the medium of a stockholder's suit in equity against a corporation to enjoin payment. However, we believe that this objection may be waived by an appropriate officer of the United States. * * * We believe that such waiver is certainly within the power of the appropriate officers of the Government in a case like the present. Section 3224 was enacted to promote, not to discourage, the

Respondents' reliance on this Court's decisions in *Hill v. Wallace*, *supra*,¹⁹ *Allen v. Regents*, *supra*, and *Miller v. Nut Margarine Co.*, *supra*, is misplaced. All of those cases involved applications of the "special and extraordinary facts and circumstances" test, first enunciated in *Dodge v. Osborn*, 240 U.S. 118, 122. Yet the confusion over the interpretation of that standard was the precise reason given by this Court for hearing and deciding the *Williams Packing* case (see 370 U.S. at 2-3 and n. 1), and it is clear that the *Williams Packing* standard was intended as a substitute rather than as an additional test for determining the applicability of the Anti-Injunction Act.²⁰

orderly administration and collection of Government revenues. Where, in the judgment of the appropriate officers, the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund, the officers should be permitted to waive the objections which Section 3224 authorizes them to raise.

¹⁹ In *Hill v. Wallace*, members of the Chicago Board of Trade had brought a type of shareholder derivative suit against the Board in order to test the constitutionality of a statute taxing grain futures transactions. Since the Court was likely to give an opinion on the constitutionality of the statute regardless of whether the Commissioner of Internal Revenue could be joined, the Solicitor General appears implicitly to have waived the benefit of the Anti-Injunction Act and argued the substantive issue of the constitutionality of the statute. See 259 U.S. at 62-63.

²⁰ The taxpayers in *Bob Jones University* and *Crenshaw*, *supra*, argued that these earlier Supreme Court cases had enunciated exceptions to the Anti-Injunction Act which were

Respondents and the court of appeals also relied heavily on *Green v. Kennedy*, 309 F. Supp. 1127 (D. D.C.) (preliminary injunction), on final injunction *sub. nom. Green v. Connally*, 330 F. Supp. 1150 (D. D.C.), affirmed *per curiam* on intervenor appeal *sub nom. Coit v. Green*, 404 U.S. 997; and *McGlotten v. Connally*, 338 F. Supp. 448 (D. D.C.).²¹ In *Green*, a class of Negro parents and children sought an injunction preventing Treasury officials from recognizing the right of white private segregated schools to tax deductible contributions under Code Section 170 (c) (2) and tax exempt status under Section 501(c) (3). The three-judge court issued the injunction, and the Treasury officials did not appeal since during the litigation they had voluntarily changed their legal position and had determined not to allow those tax benefits to the segregated schools.²² In *McGlotten*, a black applicant to an Elks Club sued to require Treasury officials to withdraw tax exempt status under Code Sections 501(c) (7) and (8) from all fraternal

in addition to that set forth in *Williams Packing*. The Fourth and the Fifth Circuits implicitly rejected those contentions, holding that *Williams Packing* controlled.

²¹ The opinion in *McGlotten* was issued on the government's motion to dismiss. A final opinion on the merits has not yet been issued.

²² In these circumstances, the memorandum affirmance of this Court on the appeal of the intervenor—parents of white children attending the segregated private schools—is not controlling authority on the jurisdictional issue. See Note, *Summary Disposition of Supreme Court Appeals: The Significance of a Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. Rev. 373, 424 (1972).

organizations and private clubs which would not admit blacks to membership. The court held (338 F. Supp. at 453-454) that the Anti-Injunction and Declaratory Judgment Acts had no application since the complainant was not seeking to restrain the assessment or collection of his own taxes.

The court of appeals below relied on these cases in support of the proposition that the Anti-Injunction and Declaratory Judgment Acts do not apply where the injunction does not seek a direct restraint on assessment or collection. This case thus adds to a growing line of injunction decisions, many of which have been brought by citizens with diverse non-tax interests, which presently threaten to shackle the administrative discretion of the Secretary of the Treasury and the Commissioner of Internal Revenue over the assessment and collection process. Several cases now pending seek declaratory judgments and injunctions to the effect that the complainant organization is exempt from tax under Section 501(c)(3) and eligible for tax deductible contributions under Section 170(c)(2). *E.g.*, *Center on Corporate Responsibility, Inc. v. Shultz*, 73-2 U.S.T.C., par. 9517 (D.D.C.), remanded for further proceedings, 73-2 U.S.T.C., par. 9518 (C.A.D.C.); *Tax Analysts and Advocates v. Shultz* (D. D.C., No. 833-73); *United States Servicemen's Fund v. Shultz* (D. D.C., No. 780-73). Still other suits seek declaratory judgments requiring the Treasury officials to withdraw various tax benefits from other taxpayers. *E.g.*, *Eastern Kentucky Welfare Rights Organization v. Shultz* (D. D.C., No. 1378-71) (suit to withdraw tax exemption ruling of

certain hospitals); *Marker v. Connally*, 29 A.F.T.R. 2d 798 (D. D.C.), affirmed on non-jurisdictional grounds, No. 72-1499 (C.A.D.C.), decided August 8, 1973 (suit to take away tax exemptions of certain unions); *Alexander v. N.F.O.* (W.D. Mo., No. CA 1919-71) (suit to take away exemption of competitor); *Common Cause v. Connally* (D. D.C., No. 1337-71) (suit to enjoin promulgation of liberalized depreciation regulations);²³ *McCoy v. Shultz*, 73-1 U.S. T.C., par. 9233 (D. D.C.) (suit to withdraw tax exemption from social clubs which discriminate against women).

Both the court of appeals (R. 38) and respondents (Resp. to Pet. 6) discounted the notion that the approach they take will open the "floodgates" to judicial interference with the tax rulings system in particular, and the tax assessment and collection system in general. We submit that the decision below, unless reversed, is likely to lead to an intrusion of the judiciary into the tax assessment system on a scale approaching that which led to the passage of the tax exception to the Declaratory Judgment Act in 1935. See Borchard, *Declaratory Judgments* (1941 ed.) 851-854. Indeed, the broad type of judicial review which respondents ask this Court to sanction is even more threatening to the aims of the Anti-Injunction and Declaratory Judgment Acts than are actions by taxpayers respecting their own tax liabilities. Tax assessment and collection are impeded not solely by injunctions forbidding assessment or collection of the

²³ The suit was dismissed by agreement of the parties.

complainant's taxes for a particular year. Even greater interference is caused by injunctions, such as that here, which seek to alter a ruling affecting both the complainant and numerous contributors and which require the Treasury Department to devote its personnel and other resources to collecting taxes against one group with a consequent diminution of resources available for collection against other more fruitful sources of revenue. See *Moore v. Miller*, 5 App. D.C. 413, 419, appeal dismissed, 163 U.S. 696; *Louisiana v. McAdoo*, *supra*.

(iii) The court of appeals borrowed the first part of the *Williams Packing* test—the requirement that the complainant show the absence of a legal remedy for which there is no adequate remedy at law—as the third part of its new exception to the injunction prohibitions. We do not quarrel with the relevance of this factor. We do, however, challenge the unduly narrow approach which led the court of appeals to conclude that the test had been satisfied.

There were at least two fully adequate legal means by which respondent could have litigated its eligibility for tax deductible contributions. First, respondent itself could have filed a claim for refund with its payment of \$981.13 in F.U.T.A. taxes in February 1970. Even if the Commissioner of Internal Revenue had failed to take any action on the claim, respondent could have brought a suit for refund as early as August 1970, in which its Section 501

²⁴ Of course, if the Commissioner had acted more quickly and denied the claim, respondent could have brought an action sooner. Code Section 6532(a).

(c) (3) tax exemption, and its consequent eligibility for tax deductible contributions, could have been litigated. See Code Section 6532(a).²⁴ If this procedure had been followed, it is likely that respondent would by now have advanced closer to securing resolution of the substantive question of its right to receive tax deductible contributions than it has through the instant litigation.²⁵

It is difficult to understand on what basis the court of appeals could have stated (R. 36, n. 13) that "the unemployment tax refund litigation * * * is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." The opinion gives no indication of the character of the "conditions" to which it refers, and we can think of none. Nor can we understand why F.U.T.A. litigation is "far removed from the mainstream of the action." Liability for payment of F.U.T.A. taxes is one of the direct tax results of revocation of a Section 501(c)

²⁵ We note that the Executive has authority to make administrative refunds of tax payments and thus to moot a lawsuit. This does not, however, pose a real threat to the adequacy of an exempt organization's legal remedy for obtaining review of withdrawal of the deductibility assurance ruling. If the refund suit involved the peculiar facts of a prior year—such as inurement of personal benefits to an officer—the lawsuit would not be dispositive of the organization's present right to a ruling in any event. Administrative refunds might be granted in these circumstances due to inadequate proof, expense of litigation, or other litigation reasons. Where, as here, the issue is purely legal and may be dispositive for future years, an administrative refund would constitute bad faith on the part of Treasury officials, which should not be presumed.

(3) tax exemption ruling. The suit for refund of taxes related to employment has recently been used as a vehicle for litigating liability for taxes as a result of revocation of a tax exemption ruling. *Christian Echoes Nat. Ministry, Inc. v. United States*, 28 A.F.T.R. 2d 5934 (N.D. Okla.), appeal dismissed on jurisdictional grounds, 404 U.S. 561, district court reversed, 31 A.F.T.R. 2d 460 (C.A. 10), petition for writ of certiorari pending, No. 72-1378. Indeed, *Williams Packing* itself was a suit relating to employment taxes.

Apart from the refund suit for unemployment taxes, there is an adequate remedy at law for redress of the respondent's injury stemming from the ruling that donations to respondent will hereafter not be considered deductible. It would be a simple matter for the respondent to enlist the aid of an officer, employee, or other friendly party to make a small donation, and then test his right to a deduction in a Tax Court or refund suit.²⁶ It is true that this procedure is formally somewhat indirect; yet such a suit is no less simple or effective on that account, and we submit that it is far preferable to subjecting the tax rulings system to the equity supervision of the federal courts.

The only irreparable injury which the respondent might sustain is the possible decrease in contributions during the period in which its tax exempt status is being litigated. This type of injury, however, is an inevitable consequence of the fact that the dispute

²⁶ The Second Circuit referred to this alternative in *Jolles Foundation v. Moysey*, 250 F. 2d 166.

between respondent and the government with respect to respondent's exempt status cannot be instantly resolved; the potential loss of contributions could only be avoided if respondent had the right to an immediate preliminary injunction which would render all contributions deductible throughout the period of litigation. It seems highly unlikely that Congress intended to allow exempt organizations automatically to retain their exempt status and the assurance of deductible contributions throughout the pendency of the law suits in which their status is litigated, regardless of the merits of their claims or the outcome of the litigation. See n. 16, *supra*. To the contrary, the language of the Anti-Injunction and Declaratory Judgment Acts and the historical development of the Congressional scheme governing administration of the tax laws strongly suggest that Congress concluded that the injury which taxpayers may suffer while pursuing the normal channels of litigation do not justify injunctive intrusion into the collection of the revenue. Indeed, this Court specifically held in *Williams Packing* that even if a claimant can show that it has sustained or will sustain irreparable damage for which there is no adequate remedy at law, it cannot obtain an injunction unless it can also show (370 U.S. at 7) that "under no circumstances could the Government prevail."

B. The suit is barred by the tax exception to the Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. 2201 and 2202, Appendix, *infra*, p. 63, bars any declaratory suit "with respect to Federal taxes." Section

2202 expands this prohibition by providing that the statute applies to any "[f]urther necessary or proper relief based on a declaratory judgment or decree * * *." The latter provision encompasses injunctions in aid of the declaration of rights, as well as the declaration itself. S. Rep. No. 1005, 73d Cong., 2d Sess. 6. Since the present case seeks a declaration as to the future tax liabilities of both respondent and its contributors, together with an injunction in support of the declaration, it is barred by the express terms of the tax exception to the Declaratory Judgment Act, regardless of the application of the Anti-Injunction Act.

The court of appeals refused to give the Declaratory Judgment Act any significance independent of the Anti-Injunction Act, reasoning that the two statutes were coterminous in scope. (R. 29-30.) This position fails to give meaning to the words of the statute and its legislative history, and departs from or misreads the applicable precedents.

The tax exception to the Declaratory Judgment Act was placed in the statute about one year after its original enactment.²⁷ It was inserted in response to a flood of suits declaring the "processing" taxes unconstitutional or inapplicable. See Borchard, *Declaratory Judgments* (1941 ed.) 850-857. The Senate Report on the prohibitory amendment noted that these cases represented a departure from precedents under the Anti-Injunction Act, and that it was neces-

²⁷ The amendment was contained in Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014.

sary to preserve tax "determination[s]," as well as assessments and collections, free of judicial interference apart from the statutory review system (S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)):

Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has *no application to Federal taxes*. The application of the Declaratory Judgments Act to taxes would constitute a *radical departure* from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that *the orderly and prompt determination and collection of Federal taxes should not be interfered with* by a procedure designed to facilitate the settlement of private controversies, and that *existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors*. [Emphasis added.]

Thus, even if it is assumed, *arguendo*, that the "assessment and collection" phrase of the Anti-Injunction Act does not encompass the alleged "non-taxpayer" complainant's attempt here to obtain a judicial declaration as to the tax liabilities of its contributors, nonetheless, this case is plainly within the broader statutory phrase "'with respect to Federal taxes,'" and concerns the "determination" of federal taxes. See Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 58 (1972); Borchard, *supra*, at 855-857.

The decisions of the lower federal courts have applied the Declaratory Judgment Act prohibition to non-taxpayer suits respecting federal taxes in circumstances virtually identical to those present here. In *Liberty Amendment Committee of the U.S.A. v. United States* (No. 70-721-HP, C.D. Cal.), affirmed *per curiam* (No. 26,507, C.A. 9), certiorari denied, 409 U.S. 1076,²⁸ the court held that the Declaratory Judgment Act barred an organization exempt from tax under Section 501(c)(4) from obtaining injunctive relief requiring the Treasury Department to issue a ruling recognizing its eligibility for tax deductible contributions under Section 170(c)(2) and tax-exempt status under Section 501(c)(3). *Jolles Foundation v. Moysey*, *supra*, involved a similar situation, with the exception that the complainant organization sought no Section 501(c)(4) ruling, since it had "no income upon which a tax might be laid."²⁹

In holding (R. 30) that the tax exception to the Declaratory Judgment Act was "coterminous" with the Anti-Injunction Act, the court of appeals relied on a line of cases beginning with *Tomlinson v. Smith*, 128 F. 2d 808, 811 (C.A. 7), and followed most recently in *McGlotten v. Connally*, 338 F. Supp. 448, 453 (D. D.C.). The *Tomlinson* case and most of its progeny actually support a contrary conclusion. In *Tomlinson*, a non-taxpayer third party—a trustee

²⁸ The opinions of the lower courts in *Liberty Amendment Committee* are printed as Appendix E to the petition in the instant case.

²⁹ Brief for the Appellant, p. 16, *Jolles Foundation v. Moysey*, *supra*.

of partnership property—sought injunctive and declaratory relief preventing the Commissioner from levying on partnership property to satisfy the tax liability of another taxpayer, *i.e.*, the complainant in his capacity as an individual partner. The court initially held that the Anti-Injunction and Declaratory Judgment Acts were “co-extensive” in the sense that they did not prohibit suits by non-taxpayers to enjoin levies on their property to satisfy the tax liabilities of other taxpayers. That holding is now codified in Section 7426 of the Internal Revenue Code. The court went on to hold, however, that the non-taxpayer complainant’s attempt to obtain a declaration as to the tax liability of the taxpayer was barred by the tax exception to the Declaratory Judgment Act. The same distinction was made in *Bullock v. Latham*, 306 F. 2d 45 (C.A. 2), on which the court of appeals below relied (R. 30), and in *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511, 515 (D. Md.), affirmed *per curiam*, 389 F. 2d 389 (C.A. 4), certiorari denied, 391 U.S. 934, upon which the *McGlotten* opinion (338 F. Supp. at 453, n. 23) relied.

The court of appeals viewed the instant case as a suit by a non-taxpayer seeking a declaration as to the tax liabilities of other taxpayers, *i.e.*, its contributors; since the instant suit could not be viewed as a suit regarding a non-taxpayer’s property taken to satisfy a taxpayer’s liability, the *Tomlinson*, *Bullock* and *Jules Hairstylists* cases directly support the government’s position. Other cases barring suits by non-taxpayers respecting the tax liabilities of other

taxpayers on the basis of the Declaratory Judgment Act include: *Singleton v. Mathis*, 284 F. 2d 616 (C.A. 8) (suit by gambling machine lessor respecting tax liability of lessee); *Mitchell v. Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456 (suit by trust grantor respecting exemption of trust from income taxes); *West Chester Feed & Supply Co. v. Erwin*, *supra*; *In re Wingreen*, *supra* (suit by bankruptcy trustee respecting tax liability of the bankrupt).

C. This action constitutes an uncontested suit against the United States and is barred by sovereign immunity

Respondent's complaint should have been dismissed for lack of jurisdiction for another separate reason. Though the named defendant in this action is the Commissioner of Internal Revenue, it is, in fact, a suit against the United States to which no consent has been given. In order to understand the full implications of the sovereign immunity rationale in the context of this case, a brief historical analysis may be helpful.

The focal point of this lawsuit is the action of the Commissioner of Internal Revenue in first issuing, and then withdrawing, an advance ruling recognizing respondent's eligibility for tax deductible contributions and exemption from unemployment taxes. The authority of Treasury Department officials to issue these rulings has roots deep in this country's history. The First Congress delegated to the Treasury Department the duty of "superintend[ing] the collection of the revenue * * *." Act of September

2, 1789, c. 12, 1 Stat. 65; see currently 31 U.S.C. 1002.³⁰ At least as early as 1792, Secretary Hamilton was addressing to Collectors the first rulings, called "circulars," informing them of the "true construction" of the revenue acts.³¹

There is no record that any ruling was ever challenged in the courts during the nineteenth century. Indeed, in the earliest days of the Republic taxpayers were allowed little judicial review of *any* actions of revenue officials in assessing and collecting taxes. In

³⁰ Perhaps to resolve doubts and conflicts concerning the authority of the Treasury Secretary, the Act of May 8, 1792, c. 37, 1 Stat. 279, Section 6, provided that "the Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage as he shall judge best."

³¹ See Circular of August 27, 1792, reproduced in *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948), p. 9:

A difference of opinion between the Collectors and Supervisors has occurred in regard to the seventh section of the Act "concerning the Duties on Spirits distilled within the United States, etc." The true construction is, that the abatement of two percent for leakage, is to be made, on securing the Duty at the end of the quarter from the whole quantity distilled during the preceding three months—and hence it will be necessary that in cases of exportation, the drawbacks on Distilled Spirits be adjusted with an eye to this allowance.

A doubt has arisen on the 35th, or more properly the 36th Section of the Collection Law, whether molasses is to be considered within the meaning of that Section. I am of opinion, it is, and that the allowance of two percent for leakage ought to be extended to that article.

1836, this Court held that a taxpayer might bring an action in the nature of assumpsit against an individual collector for a refund of taxes erroneously collected. *Elliott v. Swartwout*, 10 Pet. 137. In 1838, however, Congress enacted legislation providing that all taxes paid to Collectors under protest should be remitted promptly to the Treasury without awaiting the result of any litigation. Act of March 3, 1839, c. 82, 5 Stat. 339, Sec. 2. In *Cary v. Curtis*, 3 How. 236, 244, this Court noted the government's immunity from suit as a prime factor in holding that the Act of March 3, 1839, had effectively prohibited all assumpsit suits for refund against Collectors.³²

Even after Congress provided by statute for refund suits against Collectors (*e.g.*, Act of February 26, 1845, c. 22, 5 Stat. 727), the courts were extremely strict in requiring exact adherence to the statutory system for bringing these suits, and in barring non-complainant litigants on sovereign immunity grounds. For example, in *Nichols v. United States*, 7 Wall. 122, 126, the Court held that a taxpayer who had failed to make the required formal protest to the Treasury was barred by sovereign immunity from

³² The only remaining procedure by which a taxpayer could obtain judicial review of an alleged overassessment was to post a bond for payment and then litigate liability for the taxes when the government brought suit on the bond. See *Cary v. Curtis*, *supra*, 3 How. at 243; Brief for the Collector in *Elliott v. Swartwout*, 10 Pet. 137, summarized at *id.*, p. 146; *Ex parte Davenport*, 6 Pet. 661; *United States v. Phelps*, 8 Pet. 700. These suits were the predecessor of the modern collection suit, in which liability for the tax may be challenged by the taxpayer. *E.g.*, *United States v. O'Connor*, *supra*.

seeking a tax refund in a Court of Claims action.³³ It was not until the Act of July 30, 1954, c. 648, 68 Stat. 589, that taxpayers were allowed to bring suits against the United States for refund in the district courts without limitation as to amount involved and with full right of jury trial. See H. Rep. No. 659, 83d Cong., 1st Sess.; H. Conf. Rep. No. 2276, 83d Cong., 2d Sess. (2 U.S.C. Cong. & Adm. News (1954) 2716-2721); see generally, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 684 (1947). In addition, Congress has given its consent to taxpayers' suits in the Tax Court for the adjustment of disputes respecting the amounts of deficiencies in proposed tax assessments. Section 274 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 297; see, currently, Sections 6212 and 6213 of the Code. Apart from these procedures, and with the exception of Section 7426 which is not relevant here, Congress has not given either taxpayers or non-taxpayers consent to sue with respect to the actions of the Internal Revenue Service in assessing or collecting taxes.

The court of appeals below held that this long-standing sovereign immunity rule was inapplicable here, since the respondents contend that the Commissioner is acting in violation of the Constitution and in excess of his statutory authority. But the fact that a case alleges violations of constitutional rights

³³ Cf. *Savings Institution v. Blair*, 116 U.S. 200, 205-206; *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *Lowe Bros. Co. v. United States*, 304 U.S. 302, 306; *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533-535.

does not necessarily except it from the sovereign immunity bar. In *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 691, n. 11, this Court held that suits requiring affirmative action by the sovereign, rather than merely an order requiring the cessation of the conduct complained of, may be barred by sovereign immunity, regardless of the allegations of constitutional violations. The Court cited *North Carolina v. Temple*, 134 U.S. 22, in which it was held that sovereign immunity barred a citizen from bringing suit against the financial officer of a state and other officials, to order them to collect, and cease interference with the collection of, a state tax. The complainants there had alleged that the state officials' action in not collecting the tax violated their rights under the Contract Clause and the Fourteenth Amendment to the Constitution.

In the instant case, respondents request the district court, *inter alia*, to require the Commissioner to reinstate "Americans United" on the "Cumulative List of Organizations described in Sec. 170(c) of the * * * Code * * *"; to enjoin the Commissioner from applying Sections 170 and 501 "so as to deprive the individual plaintiffs * * * of the benefit of tax advantages * * *"; and (in the alternative) to require the Commissioner "to reopen its revocation proceedings against the corporate plaintiff * * * and reevaluate * * * [its] status as a Section 501(c)(3) charitable corporation." (R. 16.) This broad affirmative relief is precluded by the government's immunity as sovereign from suit.

The court of appeals also noted that the sovereign immunity bar does not apply where the officers' actions are beyond their statutory powers. But respondents have never questioned the authority of the Commissioner to issue rulings to private organizations regarding their tax exempt status. That power is plainly vested in the Commissioner by Section 7805 (a) of the Code, which empowers him to "prescribe all needful rules . . . for the enforcement of" the revenue laws. See generally, *Automobile Club v. Commissioner*, 353 U.S. 180. Moreover, Congress has provided in Section 7801 of the Internal Revenue Code that "the administration and enforcement of * * * [the revenue laws] shall be performed by or under the supervision of the Secretary of the Treasury."³⁴ See generally, *The Work and Jurisdiction of the Bureau of Internal Revenue*, GPO (1948). Accordingly, this case falls within the rule that an executive official's performance of a statutory duty to interpret the law, even if the interpretation is erroneous, is an action of the sovereign which the courts may not enjoin. *Larson v. Domestic & Foreign Corp.*, *supra*, 337 U.S. at 690; *Dugan v. Rank*, 372 U.S. 609, 621-622; see *Hawaii v. Gordon*, 373 U.S. 57.

This Court has recognized the immunity of Treasury officials from suit outside the prescribed statutory channels with respect to their interpretations of the federal tax statutes. In *Louisiana v. McAdoo*,

³⁴ These grants of authority can be traced back to the statutes of the First and Second Congresses discussed *supra*, pp. 42-43.

234 U.S. 627, the Court held that a suit to declare illegal the Treasury's interpretation of a tax statute must be dismissed on sovereign immunity grounds, even though the peculiar circumstances would have made it impossible for the complainant to obtain judicial review by means of a refund suit or through other procedures. The Court expressed particular concern at the fact that there, as here, the suit was brought by a complainant whose principal interest was other than his own tax liabilities (234 U.S. at 632):

Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the * * * [taxing statute] would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. * * *

See also *United States v. Correll*, 389 U.S. 299, 306-307; *Bingler v. Johnson*, 394 U.S. 741, 750-751; *Wolkstein v. Port of New York Authority*, 178 F. Supp. 209 (D. N.J.); *In re Wingreen*, *supra*.

Viewed from an historical perspective, the purpose and effect of both the sovereign immunity principle and the Anti-Injunction and Declaratory Judgment Acts are to prevent the type of disturbance of the revenue system and the revenues to which the Court referred in *McAdoo*. Together, sovereign immunity and the statutory proscriptions serve to restrict judi-

cial review of revenue administration to the statutory system composed of refund and Tax Court actions.³⁵ The decision of the court below would open up many revenue administrative acts to judicial review of a wholly different character. Such an extension of judicial review in the vital area of collection of the nation's revenue should be left to Congress rather than the courts.

II

RESPONDENTS HAVE NOT PRESENTED A SUBSTANTIAL CONSTITUTIONAL QUESTION JUSTIFYING THE CONVENING OF A THREE-JUDGE COURT

If this Court should decide any of the jurisdictional issues in the petitioner's favor, there is no need to consider the question whether a three-judge court should be convened. It is undisputed that if the district court had no jurisdiction to hear the case, there was no justification for convening a three-judge court regardless of the substantiality of the constitutional question presented. *E.g.*, *Ex parte Poresky*, 290 U.S. 30, 31; *Bailey v. Patterson*, 369 U.S. 31, 33; *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715. Even if the court had jurisdiction to entertain the

³⁵ A similar statutory system has been established with respect to import taxes. The courts have barred injunctive suits outside that system under the Anti-Injunction Act. *E.g.*, *J. C. Penney Co. v. United States Treasury Dept.*, 439 F. 2d 63 (C.A. 2), affirming *per curiam*, 319 F. Supp. 1023 (S.D. N.Y.), certiorari denied, 404 U.S. 869; *Cottman Co. v. Dailey*, 94 F. 2d 85 (C.A. 4).

suit, however, we submit that the constitutional questions presented by respondents' complaint are insubstantial and do not justify the convening of a three-judge court.³⁶

Sections 170(c) (2) and 501(c) (3) prevent an organization from qualifying for their benefits if a "substantial part" of the organization's activities "is carrying on propaganda, or otherwise attempting, to influence legislation * * *." This lobbying proscription is basically quantitative rather than qualitative in character. Note, *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412 (1954); Note, *Income Taxes—Deductions: In General—Etc.*, 80 Harv. L. Rev. 1793, 1794 (1967); see *Kuper v. Commissioner*, 332 F. 2d 562 (C.A. 3). Basically, the substantiality tests requires weighing the amount of political activity against the nonpolitical activities of the organization. The test presents a factual question to be determined on the basis of the facts and circumstances of each case. *Seasongood v. Commissioner*, 227 F. 2d 907, 912 (C.A. 6).

The determination whether lobbying activities have been substantial in any particular case requires consideration of a number of factors, including the amounts of time and effort which are devoted to lobbying activities, and whether participation in those activities is by the leadership, members, or out-

³⁶ The constitutionality of the statutory lobbying proscription and the Treasury Department's administration thereof is necessarily included in the Anti-Injunction and Declaratory Judgment Acts jurisdictional issue, and was not presented as a separate issue for review in the petition for certiorari.

siders;³⁷ the amount of money budgeted for political activities and the amount actually expended;³⁸ the number of programs and activities devoted to lobbying;³⁹ and whether the lobbying activities were sporadic, incidental or casual or, instead, regular, formal and purposeful.⁴⁰

In the court of appeals, the respondents contended that the statutory lobbying proscription violates several constitutional rights. The court held that respondents' claim that the proscription is discriminatory in violation of the Due Process Clause of the Fifth Amendment merited some consideration—that the argument's "possibility of success is not so certain as to merit the * * * [*Williams Packing*] excep-

³⁷ Statement of Assistant Commissioner Norman A. Sugarman in Hearings Before the House Special Committee to Investigate Tax Exempt Foundations and Comparable Organizations, June 2, 1954, 83d Cong., 2d Sess. 423, 433-434; Lehrfeld, *How Much Politicking Can a Charitable Organization Engage in?*, 29 J. Taxation 236 (1968).

³⁸ *Seasongood v. Commissioner*, *supra*; *Kuper v. Commissioner*, *supra*; *League of Women Voters of U.S. v. United States*, 180 F. Supp. 379 (Ct. Cl.); Caplin, *Limitations on Exempt Organizations: Political and Commercial Activities*, N.Y.U. Proceedings of the Eighth Biennial Conference on Charitable Foundations 265, 274.

³⁹ Statement of the Commissioner of Internal Revenue, Hearings on Treasury Department and Related Agencies Appropriations for 1968, Subcommittee of the House Committee on Appropriations, 90th Cong., 1st Sess. 536 (1967).

⁴⁰ Letter ruling addressed to the Sierra Club dated December 16, 1966, 1967 P-H Fed. Taxes, par. 54,664. See, also, *Liberty Nat. Bank & Trust Co. v. United States*, 122 F. Supp. 759 (W.D. Ky.).

tion with respect to * * * [the Anti-Injunction Act], yet not so frivolous or foreclosed as to merit denial of the § 2282 motion [for convening of the three-judge court]." (R. 43.) The court reasoned that wealthy organizations are greater in size, and are thus able to engage in a larger absolute number of lobbying activities without overstepping the relative "substantial" limitation. According to the appellate court, this Court's then-unannounced decision in *San Antonio Independent School District v. Rodriguez*, decided March 21, 1973, No. 71-1332 "should prove most instructive in * * * [this] area of concern * * * —'discrimination' of this type as within the 'wealth' category, and the status of 'wealth' as giving rise to the compelling interest test." (R. 42.)

To begin with, respondents and the court of appeals have misconceived the nature of the substantiality test. The determination of whether lobbying constitutes a substantial portion of any organization's total activities is not based solely or even primarily on expenditures. As explained above, numerous other factors are taken into account in the context of the peculiar totality of activities and the operational framework of each organization. It is true that an organization generously endowed with funds might find it easier to meet the substantiality test in terms of expenditures. Yet such an organization might also find it more difficult to meet the substantiality test in terms of time or activities. This is not to suggest that all organizations will experience

equal difficulties in meeting the substantiality test—indeed there have been numerous complaints over the years that certain organizations have more difficulty meeting the test because of the character of their charitable or educational activities.⁴¹ Nonetheless, we submit that the substantiality test is about as close as Congress could come to imposing a lobbying proscription which would weigh as equally as possible on all types of organizations. See Note, *supra*, 80 Harv. L. Rev. 1793, 1794; Note *Tax Treatment of Lobbying Expenses and Contributions*, 67 Harv. L. Rev. 1408, 1412.

Even assuming, however, that the statutory lobbying proscription in actual operation tends to disfavor relatively less wealthy organizations, it does not follow that the Fifth Amendment has been violated. This Court specifically disapproved a similar contention in *Rodriguez* that the school finance system there violated the Fifth Amendment because it tended to discriminate against relatively poorer individuals. Here, as in that case, respondents have not even attempted to show that the lobbying proscription “operates to the peculiar disadvantage of any class fairly

⁴¹ For example, an organization devoted to better mental health care and treatment might have more opportunities for lobbying than an organization devoted to the treatment and prevention of heart diseases: in our society, mental health has traditionally been the concern of government, while heart disease has principally been the subject of private action. Yet, under the statutory test, the mental health organization is allowed no more lobbying activities because of its character as such.

definable as indigent * * *." Here, as in *Rodriguez*, the law may treat some people or organizations different from others, but it does not offend the Fifth Amendment by classifying in an arbitrary, capricious, or invidiously discriminatory manner. See the concurring opinion of Mr. Justice Stewart in *Rodriguez*. The statutory lobbying proscription thus creates no constitutionally "suspect" classification. Accordingly, under *Rodriguez* the appropriate Fifth Amendment test is whether the provision is within the wide latitude and discretion, including "considerations of policy and practical convenience," allowed to legislative bodies in framing tax statutes. See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548, 584-585; *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 512-513.

The substantiality clause of Sections 170 and 501 (c) (3) meets this rationality standard, for as Judge Wilkey pointed out in his concurring opinion (R. 43-45), an absolute lobbying limitation would have created serious problems. If the limit were pegged to small organizations, the number of legislative appearances allowed to large organizations would have been inadequate to represent even their most fundamental interests. On the other hand, if the limit were pegged to large organizations, small groups would in effect be allowed to devote virtually all of their resources to lobbying. In these circumstances, the relative "substantiality" test marks a reasonable solution.⁴²

⁴² In 1969, Congress made extensive efforts to place more exact and stringent standards on the political activities of tax

Respondents also argued below that the statutory lobbying proscriptions violated their rights of political action—speech, press, assembly and petition for redress of grievances—under the First Amendment. This contention was properly rejected by the court of appeals (R. 41) as having been disposed of in the unanimous opinion of this Court in *Cammarano v. United States*, 358 U.S. 498, 512-513. There the Court held that a similar lobbying proscription in another provision of the Internal Revenue Code ⁴³ did not constitute infringement of First Amendment rights, stating (358 U.S. at 513):

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums

exempt organizations. The result of these efforts was the enactment of Code Sections 509 and 4945, which impose heavy tax burdens on political activities of certain tax exempt organizations. The legislative history of these statutes, together with the difficulties of legislating standards which are more definite and easier to administer, are discussed in Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 Geo. Wash. L. Rev. 1114, 1125-1136 (1970). There are presently pending in the 93d Congress at least two bills (H. R. 5095 and S. 1036) aimed at altering the substantiality test. See 78 Cong. Rec., Part 6, p. 5959.

⁴³ Section 23(a)(1) of the 1939 Code and Sections 29.23(o)-1 and 29.23(q)-1 of Treasury Regulations 111 (1939 Code).

expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Since the lobbying proscription here is similarly non-discriminatory, it does not impinge upon respondent's political action rights under the First Amendment. As Mr. Justice Douglas stated in his concurring addendum in *Cammarano* (358 U.S. at 515):

* * * the view favored in some quarters that First Amendment rights must be protected by tax exemptions * * * savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions * * * and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with [the] First Amendment * * *.⁴¹

⁴¹ Respondents also contended below that the lobbying proscription in effect acts as an "establishment" of large religions which they oppose since those organizations are more wealthy and can undertake a greater absolute quantum of lobbying. This argument is actually a variation of the Due Process argument. Since the enactment and administration of the lobbying proscription are based on a wholly secular rationale, the argument is without merit. *Gillette v. United States*, 401 U.S. 437, 449, n. 14; see *Walz v. Tax Commission*, 397 U.S. 664.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC, CONTRIBUTIONS
AND GIFTS.

* * * *

(c) [as amended by Sec. 201(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Charitable Contribution Defined*.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

* * * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (includ-

ing the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * *

SEC. 3301 [as amended by Sec. 301(a), Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695]. **RATE OF TAX.**

There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)).

SEC. 3306. **DEFINITIONS.**

* * * *

(c) [as amended by Sec. 105(a), Employment Security Amendments of 1970, *supra*] *Employment.*—For purposes of this chapter, the term “employment” means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for

the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, * * * except—

* * * *

(8) [as amended by Sec. 533, Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

* * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax*.—Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

28 U.S.C.:

§ 2201 *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.